No. 17-646

In The Supreme Court of the United States

TERRENCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888
legal@rutherford.org

Elliott Harding
Harding Counsel PLLC
608 Elizabeth Avenue
Charlottesville, VA 22901
(434) 962-8465

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

No. 17-646

IN THE
SUPREME COURT OF THE UNITED STATES

TERENCE MARTEZ GAMBLE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Petitioner in the above-styled case presently before this Court for oral argument.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but written consent was not obtained from Respondent United States.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this

case because the Institute is keenly interested in protecting the civil liberties of individuals from infringement by the government. The issue presented in this case, *i.e.*, whether persons are subject to successive prosecutions by different units of government for the same offense, is one of great importance because the power to conduct successive prosecutions presents a danger of abuse of power by the government that is antithetical to the mandate of U.S. Const. Amend. V that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]"

As a civil liberties organization, The Rutherford Institute and the brief set forth, *infra*, brings a discerning analysis to the issues presented in this case. The Institute specializes in protecting the constitutional rights of individuals and its experience in these matters will bring to light matters which will assist the Court in reaching a just solution to the questions presented.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

TABLE OF CONTENTS

Motion i

Table of Authorities iv

Interest of *Amicus Curiae* 1

Summary Of The Argument 2

Argument 3

I. THE DUAL SOVEREIGNTY DOCTRINE IS IN DIRECT CONFLICT WITH FEDERALISM AND ENCOURAGES ABUSE OF POWER 3

A. The Supremacy Clause and Double Jeopardy Clause Procedurally Preempt States From Prosecuting Individuals For Conduct Proscribed By Congress, Thereby Invalidating The Dual Sovereignty Doctrine 5

B. The Dual Sovereignty Doctrine Has Created A Criminal Justice System Ripe For Abuse 10

1. A circuit split pertaining to the Sixth Amendment's right to counsel is predicated on the dual sovereignty exception to double jeopardy 11

2. Centralized prosecution and the threat of simultaneous criminal proceedings run the risk of overbearing a defendant by manipulating the exceptions within a system of dual sovereignty 12

Conclusion 14

TABLE OF AUTHORITIES

Cases

Abbate v. United States, 359 U.S. 187 (1959) 4

Albernaz v. United States, 450 U.S. 333 (1981) 4

Barron v. Baltimore, 32 U.S. 243 (1833) 3

Bartkus v. Illinois, 359 U.S. 121 (1959) .....passim

Benton v. Maryland, 395 U.S. 784 (1969) 2, 4, 9

Blockburger v. United States, 284 U.S. 299 (1932)... 5

Bond v. United States, 134 S. Ct. 2077 (2014) 5

Brooks v. United States, 267 U.S. 432 (1925) 13

California v. Zook, 336 U.S. 725 (1949) 6, 7

Ex parte Siebold, 100 U.S. 371 (1879) 13

Fox v. Ohio, 46 U.S. 410 (1847) 3, 7

Hines v. Davidowitz, 312 U.S. 52 (1941) 7

McCulloch v. Maryland, 17 U.S. 316 (1819) 5

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 13

North Carolina v. Pearce, 395 U.S. 711 (1969) 4

Pacific Gas & Elec. Co. v. State Energy Resources Conservation Development Commn., 461 U.S. 190 (1983) 10

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). 9

Texas v. Cobb, 532 U.S. 162 (2001) 11

United States v. Alvarado, 440 F.3d 191 (4th Cir. 2006) 11

United States v. Avants, 278 F.3d 510 (5th Cir. 2002) 11

United States v. Burgest, 519 F.3d 1307 (11th Cir. 2008) 11

United States v. Coker, 433 F.3d 39 (1st Cir. 2005) 11

United States v. Comstock, 560 U.S. 126 (2010) 5

United States v. Lopez, 514 U.S. 549 (1995) 5

United States v. Mills, 412 F.3d 325 (2d Cir. 2005) 11

United States v. Red Bird, 287 F.3d 709 (8th Cir. 2002) 11

Constitutional Provisions

U.S. Const. Amend. V ..... passim

U.S. Const. Amend. VI 3, 11

U.S. Const. Amend. XIV 2, 4, 9

U.S. Const. Art. I, § 8 ..... 8, 13

U.S. Const. Art. VI (Supremacy Clause) ..... passim

Other Authorities

Haley White, *Centralized Prosecution: Cross-Designated Prosecutors and an Unconstitutional Concentration of Power*, 21 Wash & Lee J. Civ. Rts. & Soc. Just. 521 (2015)..... 12

Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 Law & Soc. Inquiry 239 (2005)..... 12

INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 36 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion, or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because it involves the fundamental civil right that persons should not put to the expense, stress and inconvenience of successive prosecutions for the same offense. The Double Jeopardy Clause of the Fifth Amendment was meant to prevent the government from abusing its awesome power to prosecute individuals. Because continuation of the dual sovereignty doctrine makes misuse of this

---

[1] No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

power more prevalent and likely, The Rutherford Institute asks that the Court abolish the doctrine.

SUMMARY OF THE ARGUMENT

This Court should overrule the dual sovereignty exception to the Double Jeopardy Clause, as it is incompatible with the text of the Fifth Amendment to the U.S. Constitution. The text offers no exceptions to its protection from successive prosecution for the same conduct, regardless of which sovereign seeks to punish and in what order. Once the Double Jeopardy Clause was incorporated to the States via the Fourteenth Amendment to the U.S. Constitution in *Benton v. Maryland*, 395 U.S. 784 (1969), the Federal Government and the States were barred from engaging in their own successive prosecutions for the same conduct. This principle must apply when two sovereigns seek to engage in successive prosecutions following the prosecution by another. Additionally, the Supremacy Clause of U.S. Const. Art. VI and the Fifth Amendment should procedurally preempt the States from prosecuting conduct proscribed by Congress, thereby ending the dual sovereignty doctrine.

The dual sovereignty exception to the Fifth Amendment's Double Jeopardy Clause unnecessarily enables a system where prosecutors and law enforcement officers can simultaneously work against a defendant on behalf of the Federal and State government and apply overbearing institutional pressure. This has led to simultaneous prosecutions against the same defendants for the same conduct by the same prosecutors and law

enforcement officers. Several sensitive rights remain in constitutional question due to the dual sovereignty exception, including a circuit split related to the Sixth Amendment's right to counsel. This Court's prior decisions concerning the incorporation of the Bill of Rights and the dual sovereignty doctrine reflect the principle that current precedent allowing coordinate governments to accomplish together what neither can do alone may not stand. This applies with equal force to the Double Jeopardy Clause.

ARGUMENT

I. THE DUAL SOVEREIGNTY DOCTRINE IS IN DIRECT CONFLICT WITH FEDERALISM AND ENCOURAGES ABUSE OF POWER.

The "dual sovereignty" doctrine, first recognized in *Fox v. Ohio*, 46 U.S. 410 (1847), stands for the proposition that the Federal Government and the States can successively prosecute an individual for the same conduct without violating the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 435; *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959) ("In a dozen cases decided by this Court between *Moore v. Illinois* [55 U.S. 13 (1852)] and *United States v. Lanza* [260 U.S. 377 (1922)] this Court had occasion to reaffirm the principle first enunciated in *Fox v. Ohio*."). In *Fox*, the Court relied on *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights did not apply to the States. *See Fox*, 46

U.S. at 434–35 ("[The Bill of Rights] are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens."). Two decades later, the United States ratified the Fourteenth Amendment, which lead to the incorporation of several guarantees within the Bill of Rights to the States, including the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784, 787, 794 (1969) ("On the merits, we hold that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment.").

The Double Jeopardy Clause reads: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const., Amend V. It "protects against a second prosecution for the same offense," "against a second prosecution for the offense after conviction," and "against multiple punishments for the same offense." *Albernaz v. United States*, 450 U.S. 333, 343 (1981); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Prior to *Benton*'s incorporation of the Double Jeopardy Clause to the States, every challenge to the dual sovereignty doctrine since the ratification of the Fourteenth Amendment necessarily came as a due process challenge. *See, e.g., Bartkus*, 359 U.S. 121; *Abbate v. United States*, 359 U.S. 187 (1959). Now that the Double Jeopardy Clause applies to both Federal and State prosecution, *Benton v. Maryland*, 395 U.S. at 787, the Court must reconsider these holdings and rule in the alternative, as the bar against successive prosecution is no longer "sovereign specific" but remains offense specific. U.S. Const. Amend V; *see also Blockburger v. United*

States, 284 U.S. 299, 304 (1932) (providing the test as to whether conduct is the "same offense" for purposes of Double Jeopardy: "[if] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

A. The Supremacy Clause and Double Jeopardy Clause Procedurally Preempt States From Prosecuting Individuals For Conduct Proscribed By Congress, Thereby Invalidating The Dual Sovereignty Doctrine.

In our federal system, the United States possesses only limited powers; the States and the People retain the remainder. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) ("The States have broad authority to enact legislation for the public good — what we have often called a 'police power.'"); *United States v. Lopez*, 514 U.S. 549, 567 (1995). The Federal Government has no police power and "can exercise only the powers granted to it," *McCulloch v. Maryland*, 17 U.S. 316 (1819), including the power to prosecute, *id.*, and make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers. *Bond*, 134 S. Ct. at 2086. When Congress enacts criminal law, it does so pursuant to an enumerated power unique from the States, as Congress does not have general police powers. *Id.*; *United States v. Comstock*, 560 U.S. 126, 148 (2010) (citing *Morrison*, 529 U.S. at 618); *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring) ("The

Federal Government has nothing approaching a police power."). Nevertheless, the dual sovereignty doctrine has historically afforded Federal and State governments with autonomy to prosecute for the same conduct. This fundamental "power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers . . . ." *McCulloch*, at 418.

Though they differ from a double jeopardy challenge, several cases have come before this Court to challenge State criminal laws seeking to punish the same conduct as Federal legislation under the preemption doctrine. *See, e.g., California v. Zook*, 336 U.S. 725 (1949) (challenging State power to criminalize conduct proscribed by Federal law). These preemption cases challenged State' authority to enact criminal legislation rather than the State' authority to prosecute, but the jurisprudence serves as a relevant guide when considering the conflict between the States' general police powers and Federal prosecution of laws enacted pursuant to enumerated powers.

Similar to the power to tax, *cf. id.* at 425, the power to punish has been considered one of such "vital importance" that "it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." *Cf. id.* But, akin to the power to tax, the States' independent authority to prosecute must give way to federal

preemption when State action would burden Federal sovereignty. *Cf. id.* at 427 ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."). When applying the Supremacy Clause as preemption to State action, the Court's primary function is to determine whether state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (finding state criminal law to be preempted by federal law). The Fifth Amendment's Double Jeopardy Clause prevents successive punishment for the same offense, therefore State prosecution for the same conduct proscribed by federal law serves as a fundamental "obstacle" to the accomplishment and execution of federal prosecution. It is "of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans." *Id.*

In *California v. Zook*, this Court relied on *Fox*'s dual sovereignty doctrine and considered the issue of preemption as it related to criminal prosecution. 336 U.S. at 731. A California statute prohibited the sale or arrangement of any transportation over the public highways of the State if the carrier had no permit from the federal Interstate Commerce Commission ("I.C.C."). *Id.* at 726–27. The federal Motor Carrier Act had a similar provision. The question was whether the state act was invalid in light of the

federal act. *Id.* Both the California and federal statutes required Zook to sell transportation only in carriers having permits from the I.C.C. Zook was prosecuted under the state act, admitted the unlawful activity, but demurred to the criminal complaint on the sole ground that the state statute entered an exclusive congressional domain. *Id.* at 727. The Court rejected Zook's argument, suggesting that the alternative would erroneously "set aside great numbers of state statutes" in the name of federal preemption because it would be attempting "to satisfy a congressional purpose which would be only the product of th[e] Court's imagination." *Id.* at 732–33. The case currently before the Court raises a materially different question, but the Constitution requires the same outcome that the *Zook* Court imagined—State criminal laws must give way to Federal laws that punish the same conduct because the Double Jeopardy Clause is a procedural bar against successive prosecution for the same offense.

In every preemption case, the Constitutional inquiry dealt with a conflict between State and Federal law, enacted according to Article I of the Constitution. Now the Court must consider a similar, but materially different dichotomy: two sovereigns proscribing the same conduct but bound by the same limitation on successive prosecution.

In this situation, States must be procedurally preempted from prosecuting an individual when the same offense has been proscribed by the United States, as the State voluntarily ceded its general police powers pursuant to Article I, § 8 of the United States Constitution, the Supremacy Clause, and the

Fourteenth Amendment. Prior to the ratification of the Fourteenth Amendment, the Bill of Rights was a limitation on the Federal Government by the States. The Fourteenth Amendment was a fundamental change, acting as a self-imposed limitation on the States, by the States, with the incorporation of the Bill of Rights placing State sovereignty into self-subjugation to federal constitutional standards. *See Benton*, 395 U.S. at 795 ("Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments.").

It has been a "perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947). Since ratification of the Fourteenth Amendment and *Benton*'s incorporation of the Double Jeopardy Clause to the States, the dual sovereignty doctrine has been in direct conflict with the Supremacy Clause and the Fifth Amendment. The Constitution makes a single sovereign responsible for maintaining a comprehensive and unified system to prosecute infractions against the United States when Congress has chosen to proscribe conduct pursuant to its enumerated powers. When Congress does not choose to proscribe this conduct, the States' police powers remain unencumbered.

When considering the interplay between our federal and state criminal justice systems, the Fifth

Amendment's Double Jeopardy Clause must be interpreted as an "actual conflict" between state and federal prosecutions. *Cf. Pacific Gas & Elec. Co. v. State Energy Resources Conservation Development Commn.*, 461 U.S. 190, 204 (1983) ("Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law."). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). When Congress chooses to proscribe conduct pursuant to its enumerated powers—powers which were ceded by the States—the Double Jeopardy Clause bars successive prosecution and the Supremacy Clause bars prosecution by the State altogether.

B. The Dual Sovereignty Doctrine Has Created A Criminal Justice System Ripe For Abuse.

This Court recognized a caveat to the dual sovereignty doctrine in *Bartkus v. Illinois*, suggesting an exception when the state brings its prosecution as merely a tool of the federal authorities who avoid the Fifth Amendment's prohibition against a retrial of a federal prosecution after an acquittal. 359 U.S. at 123–24. Though the Court has never had the opportunity to hold that such an exception actually exists, several other

forms of procedural abuse are plausible via the dual sovereignty doctrine.

1. A circuit split pertaining to the Sixth Amendment's right to counsel is predicated on the dual sovereignty exception to double jeopardy.

The right to counsel set forth in U.S. Const. Amend. VI is considered "offense specific" and is deemed inapplicable when defendants are questioned about conduct for which they have not been charged. *See Texas v. Cobb*, 532 U.S. 162, 173 (2001). The dual sovereignty doctrine has lead to a circuit split as to whether it applies in the context of the Sixth Amendment's right to counsel. *Compare United States v. Burgest*, 519 F.3d 1307 (11th Cir. 2008) (holding that the dual sovereignty doctrine does not apply to the Sixth Amendment's right to counsel because a crime cannot be the "same offense" when proscribed by a separate sovereign); *United States v. Alvarado*, 440 F.3d 191, 194 (4th Cir. 2006) (same); *United States v. Coker*, 433 F.3d 39, 44 (1st Cir. 2005); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002) (same); *with United States v. Mills*, 412 F.3d 325 (2d Cir. 2005) (holding *Cobb* does not require the dual sovereignty doctrine be extended to the definition of an offense in the Sixth Amendment context); *United States v. Red Bird*, 287 F.3d 709, 715 (8th Cir. 2002) (same). By invalidating the dual sovereignty doctrine for the purpose of double jeopardy, the Court has the opportunity to give guidance to the lower circuits as it relates to the Sixth Amendment's right to counsel as well.

2. Centralized prosecution and the threat of simultaneous criminal proceedings run the risk of overbearing a defendant by manipulating the exceptions within a system of dual sovereignty.

Though the *Bartkus* Court addressed the permissibility of a second prosecution by a government other than the one first prosecuting, it did not consider the now-prevalent use of cross-designated Special Assistant United States Attorneys ("SAUSA") or federal-state Joint Task Forces ("JTF"), which handle the investigation and prosecution of the same defendant by separate sovereigns.

The modern paradigm of SAUSAs and JTFs involves cooperation between state and federal forces that share resources between sovereigns. *See* Haley White, *Centralized Prosecution: Cross-Designated Prosecutors and an Unconstitutional Concentration of Power*, 21 Wash & Lee J. Civ. Rts. & Soc. Just. 521 (2015). Because SAUSAs and JTFs involve sovereigns cooperating as equals, they present a distinct set of facts from cases considered in *Bartkus*. In some instances, the same prosecutor and law enforcement officers can simultaneously proceed against the same defendant on behalf of both sovereigns. *Id.*; *see also* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 Law & Soc. Inquiry 239, 247 (2005) (explaining that local prosecutors have the ability to threaten to

bring charges in federal court unless defendant pleads guilty).

A system with traditional limitations provided context for the *Bartkus* Court's analysis of a hypothetical overlap between federal and state authority. As one court noted, "there are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties." *Ex parte Siebold*, 100 U.S. 371, 392–93 (1879). The increase in federal involvement in the criminal justice system is largely be attributed to the expansion of the Commerce Clause of U.S. Const. Art. I, § 8, and this Court has noted that Congress' exercise of power under the commerce clause is analogous to the police power of the states. *Brooks v. United States*, 267 U.S. 432, 436–437 (1925). Proliferation of interstate commerce and subsequent criminal laws addressing these issues increased the interaction between federal and state law enforcement.

In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55-56 (1964), interpreted the extensive interaction between state and federal authorities within the criminal process, as part of an "age of 'cooperative federalism,' [in which] the Federal and State Governments are waging a united form against many types of criminal activity." This has since developed into the creation of SAUSAs and JTFs. The expansion of the federal role in criminal justice has resulted in a myriad federal-state JTFs and hundreds of SAUSAs throughout the nation, each running the risk of overwhelming a defendant

and abusing civil liberties with impunity due to the dual sovereignty doctrine. These abuses appear in the form of the prosecutor's charging and sentencing decisions, plea agreements, evidence gathering, the defendant's access to counsel, his right to effective counsel, and the finality of a verdict.

CONCLUSION

For the foregoing reasons, the Court should overrule the dual sovereignty doctrine and reverse the judgment below.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888
legal@rutherford.org

Elliott Harding
Harding Counsel PLLC
608 Elizabeth Avenue
Charlottesville, VA 22901
(434) 962-8465